

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3639

Appeal MA16-328

Toronto Police Services Board

July 27, 2018

Summary: A request was submitted to the Toronto Police Service Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an incident involving the requester. The police located responsive records and granted partial access to them, denying access to portions pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The police also withheld some of the information as not responsive to the request. The requester appealed the police's decision to withhold the information and indicated that additional responsive records should exist. In this order, the adjudicator finds that some of the information identified by the police as not responsive to the request is responsive and orders the police to issue an access decision with respect to it. She finds that section 38(b) applies to the information the police withheld under that exemption. She also finds that the police conducted a reasonable search for records responsive to the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 17, 38(b).

OVERVIEW:

[1] A request was submitted to the Toronto Police Services Board (the police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all information held by the police relating to a specific incident involving the requester.

[2] The police located the responsive records, two separate General Occurrence Reports relating to the incident, and provided partial access to them, denying access to

portions of the information pursuant to the discretionary personal privacy exemption at section 38(b) of the *Act*. The police also advised that some of the information contained in the records was not responsive to the request and they withheld it on that basis.

[3] The requester, now the appellant, appealed the police's decision.

[4] The appellant's husband made a separate request to the police for information about him in relation to this incident. That decision was also appealed to this office and is being processed as a separate appeal under Appeal Number MA17-194.

[5] During mediation, the appellant noted that the police withheld the personal information of her husband. Subsequently, this office sought and received the appellant's husband's consent to disclose his personal information to the appellant and the police issued a supplemental decision disclosing the information to the appellant.

[6] The appellant also advised that she believes additional records responsive to her request should exist. The police conducted an additional search and located several additional records, including two I/CAD Event Details Reports (relating to the two General Occurrence Reports), a third General Occurrence Report and police officer memorandum book notes. The police issued a second supplemental decision granting access to the newly located records, in part. The police again claimed the application of the exemption at section 38(b) to withhold portions of the additional records. The police also withheld portions on the basis that they were not responsive to the request.

[7] At the conclusion of mediation, the appellant advised that she is still not satisfied with the police's decision and advised that she seeks access to all the information that has been withheld, including the information the police claimed as non-responsive. The appellant also continues to believe that additional records should exist.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I sought and received representations from the police which were shared with the appellant. The appellant provided representations in response.

[9] I also sought representations from two affected parties who might have an interest in the disclosure of the information at issue; the appellant's husband and a third party witness. Neither affected party provided representations in response.

[10] In this order, I find that some of the information identified by the police as not responsive to the request is responsive and I order the police to issue an access decision with respect to it. I find that the discretionary exemption at section 38(b) applies to the information for which it has been claimed. Finally, I find that the police's search for records responsive to the request was reasonable.

RECORDS:

[11] The responsive records consist of various police documents, including three General Occurrence Reports, two I/CAD Event Details Reports and police officer memorandum book notes. The portions at issue are those that have been withheld on the basis that the exemption at section 38(b) applies, and on the basis that they are not responsive to the request.

ISSUES:

- A. Is the information identified by the police as not responsive to the request, within the scope of the request?
- B. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- C. Does the discretionary exemption at section 38(b) apply to the information at issue?
- D. Did the police conduct a reasonable search for responsive records?

DISCUSSION:

A. Is the information identified by the police as not responsive to the request, within the scope of the request?

[12] The appellant takes the position that the information that has been withheld by the police as not responsive to the request is, in fact, responsive and should be disclosed to her.

[13] It has been determined that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹ To be considered responsive to the request, records must "reasonably relate" to the request.²

[14] The majority of the information that was withheld from the record as not responsive is information pertaining to the Canadian Centre for Justice Statistics (CCJS). The police have also withheld as not responsive, a sentence on what has been identified on the original index as page 13 of the records and portions of the police officer memorandum book notes. They do not provide any specific representations on why this information is not responsive to the request. The appellant also does not make any specific submissions with respect to this information.

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

[15] Having reviewed the information that the police have identified as not responsive to the request, I find that the information pertaining to the CCJS is responsive to the request. This information appears on pages 1, 8, 10, 21, and 24.

[16] Specifically, with respect to the CCJS information, in my view, although I am not convinced that the severed information would provide the appellant with new information or more information than she already has before her, the information that has been identified as pertaining to the CCJS reasonably relates to the request. The request is for information relating to a specific incident document in the General Occurrence Reports and the sections of those reports that details information for the CCJS forms part of them. In the absence of further evidence from the police on why CCJS information found in the middle of General Occurrence Reports that relate to the specific incident identified in the request is not responsive, I find that it is. Accordingly, I will order the police to issue an access decision with respect to the information identified as not responsive of pages 1, 8, 10, 21 and 24 of the records.

[17] With respect to the remaining information identified by the police as not responsive to the request, I accept that it is not responsive. The majority of this information appears in the police officer memorandum book notes and amounts to information that is not related to the incident identified in the request, but to matters that are entirely unrelated including internal police affairs. Accordingly, I uphold the police's decision to withhold this information as not responsive to the request.

B. Does the record contain "personal information" as defined in section 2(1) of the Act and, if so, to whom does it relate?

[18] The police have claimed that section 38(b) applies to withhold portions of the responsive records, as disclosure of that information would amount to an unjustified invasion of the personal privacy of individuals other than the appellant. For section 38(b) to apply, the records must contain the personal information of the appellant and another individual. The term "personal information" is defined in section 2(1) of the *Act* as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[19] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.³

[20] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁴

[21] The police submit that the responsive records contain the name, address, telephone number(s), dates of birth and other identifying information of a witness involved in the incident. The police further submit that if this information is disclosed, "it is a certainty that this individual will be identified, and [their] personal privacy breached..."

[22] The appellant's representations do not specifically address the issue of whether the records contain personal information.

[23] Having reviewed the records that are responsive to the request, they clearly contain the personal information of both the appellant and her husband as well as the personal information of the witness, another identifiable individual. The personal information includes information relating to their race, national origin, colour, age, sex and marital status (paragraph (a)), information relating to their medical, psychiatric, and psychological history (paragraph (b)), identifying numbers or particulars, their address and telephone numbers (paragraph (d)), their personal opinions or views of other individuals about them (paragraph (g)), and their names where they appear with other personal information relating to them (paragraph (h)).

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[24] Given that I find that the records contain the personal information of the appellant and another individual, I must now consider whether the discretionary personal privacy exemption at section 38(b) applies to the information at issue.

C. Does the discretionary exemption at section 38(b) apply to the information at issue?

[25] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right.

[26] Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁵

[27] In determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), sections 14(1) to (4) provide guidance. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 14(1) of the *Act*.

[28] For records claimed to be exempt under section 38(b) (i.e., records that contain the requester’s own personal information), this office will consider, and weigh, the factors and presumptions in both sections 14(2) and (3) and balance the interest of the parties in determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁶ Additionally, if any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and is not exempt under section 38(b).

[29] The police submit that the presumption at section 14(3)(b) applies. That section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[30] The police submit that in the current appeal, the presumption at section 14(3)(b) applies because all of the personal information at issue was gathered as part on an

⁵ See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 38(b).

⁶ Order MO-2954.

investigation into a possible violation law. They submit that although criminal proceedings were not commenced, previous orders have established that the section still applies.⁷

[31] The appellant does not specifically address whether disclosure of the information at issue would amount to an unjustified invasion of personal privacy.

[32] The information that the police have severed from the records under section 38(b) amounts to the personal information of a witness, an identifiable individual other than the appellant or her husband.

[33] On my review of the records at issue, I accept that the presumption at section 14(3)(b) applies. The records clearly relate to the police's investigation into a reported incident to determine whether a violation of law had occurred. As indicated by the police, even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn or not laid at all.⁹ In my view, none of the other presumptions at section 14(3) are relevant in the circumstances of this appeal.

[34] With respect to the factors in section 14(2), although not specifically raised by either the police or the appellant, I accept that the factors at paragraphs (f) (highly sensitive) and (h) (supplied in confidence) are both factors weighing against the disclosure of the information that has been withheld. The information relates to a witness to the incident, and based on its content, it could reasonably be expected that it is highly sensitive and was supplied to the police by that witness in confidence. From my review, and considering the evidence before me, none of the factors weighing in favour of disclosure apply.

[35] For section 38(b) to apply, the factors weighing against disclosure must outweigh the factors weighing in favour of disclosure. As no factors favouring disclosure have been established nor do they appear to be relevant, it is not necessary for me to consider the relevance of the factors at section 14(2)(f) or (h) in detail. Given the application of the presumption at section 14(3)(b), and the fact that no factors favouring disclosure have been established, balancing all the interests, I am satisfied that disclosure of the personal information that remains at issue could reasonably be expected to constitute an unjustified invasion of the personal privacy of the individual to whom that information relates. Subject to my review of the police's exercise of discretion, I find that the personal information that has been severed from the records is exempt from disclosure under the discretionary personal privacy exemption at section 38(b).

⁷ Orders P-242 and MO-2235.

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

[36] As section 38(b) is a discretionary exemption, it permits the police to disclose information, despite the fact that they can withhold it. They must exercise their discretion. On appeal, this office may determine whether an institution failed to do so. This office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant consideration
- it fails to take into account relevant consideration.

[37] In the circumstances of this appeal, the police submit that they considered the fact that the only information they have withheld under section 38(b) is the personal information of the witness. They submit that in exercising its discretion not to disclose this information, they balanced the appellant's right of access against the witness' right to privacy and determined that, given the nature of the information that was withheld and the fact that much of the information in the records was disclosed, they would exercise their discretion in favour of protecting the witness' right to privacy. They explain that witness participation in police investigations necessitates communicating an element of trust that the law enforcement agency will act responsibly with respect to personal information provided to them.

[38] Based on the police's representations and my review of the information at issue in the records, I am satisfied that the police have not erred in their exercise of discretion with respect to their application of 38(b) to the information that they have withheld. I accept that in withholding the information, they have exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant ones.

[39] Accordingly, I uphold the police's exercise of discretion and find that the information at issue is exempt under section 38(b).

D. Did the police conduct a reasonable search for responsive records?

[40] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹⁰ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹¹ To be responsive, a record

¹⁰ Orders P-85, P-221 and PO-1954-I.

¹¹ Orders P-624 and PO-2559.

must be "reasonably related" to the request.¹²

[41] The police submit that they conducted a reasonable search for records responsive to the appellant's request. They submit that as the appellant was unambiguous in requesting the records she sought, additional clarification was not required. The police submit that they did not respond literally to the request, nor did they define the scope unilaterally and submit that all appropriate action was taken in order to provide a comprehensive response.

[42] The police submit that the incident that formed the subject matter of the request was straightforward and the relevant responsive records were initially thought to consist only of two separate General Occurrence reports, and partial access was granted to them. However, the police submit that during mediation upon learning that the appellant believed that additional records exist, clarification was made and the appellant's request was expanded to include more than just the two General Occurrence Reports originally located. The police submit that at that time, an additional search located two related I/CAD Event Details Report (print outs of 911-calls) and the relevant memorandum book notes of four named police officers. The police issued a supplemental decision letter regarding access to these records, denying access to them, in part, pursuant to section 38(b) and on the basis that portions were not responsive to the request.

[43] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.¹³ A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹⁴

[44] I accept that, on its face, the request at issue is clear and did not require any additional clarification prior to its processing. Additionally, I accept that the actions taken by the police to search and identify records responsive to the request were reasonable and undertaken by experienced employees, knowledgeable in the subject matter of the request. I acknowledge that it is unfortunate that it was only during mediation, upon further clarification, that the police subsequently identified additional responsive records. However, those records have since been disclosed to the appellant. I have no evidence before me to suggest that additional responsive records should exist.

[45] In the absence of a reasonable basis upon which to believe that additional responsive records might exist, for a search to be considered reasonable, the police must demonstrate that an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request. In the circumstances before me, I have found this to be the

¹² Order PO-2554.

¹³ Orders M-909, PO-2469 and PO-2592.

¹⁴ Order MO-2185.

case. Accordingly, I uphold the police's search as reasonable.

ORDER:

1. I order the police to issue an access decision in accordance with the *Act* with respect to the CCJS that they have identified as not responsive to the request on pages 1, 8, 10, 21 and 24 of the records. For the purposes of sections 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.
2. I uphold the police's decision to deny access to the information that it has withheld under section 38(b).
3. I uphold the police's search for responsive records as reasonable.
4. In order to confirm compliance with this order, I reserve the right to require the police to provide me with a copy of the access decision, including any information disclosed to the appellant, issued pursuant to order provision 1.

Original Signed by: _____

Catherine Corban
Adjudicator

July 27, 2018 _____